

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
Petition of McVey Associates for Waiver)	CG Docket No. 02-278
of Section 64.1200(a)(4)(iv) of the)	
Commission's Rules)	CG Docket No. 05-338
)	
)	

**COMMENTS OF FLORENCE MUSSAT M.D., S.C., ON
PETITION OF MCVEY ASSOCIATES, INC., FOR RETROACTIVE WAIVER**

McVey Associates, Inc.'s petition must be denied as it fails to demonstrate any good cause of why it was untimely. On October 30, 2014, the Commission denied 24 petitions challenging the validity of the opt-out regulation¹, and further stated that the Commission, "expect[ed] parties making similar requests [for waivers] to make every effort to file within six months of the release of this Order."² McVey did not file its Petition for Waiver with the Commission until August 31, 2015, a full *four months after* the overly generous six-month time period provided for by the Commission.

McVey's Petition for Waiver is void of any explanation of why it waited until August 31, 2015, to file its Petition. Indeed, the only reference in its Petition of why it is filing the petition is that it got caught by a single doctor's office who is tiered of having junk faxes sent to it, and filed suit against McVey on August 24, 2015, seeking monetary relief and for it to stop its

¹ *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Presentation Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel Oct. 30, 2014) ¶¶ 19-20, 32 & n. 70.

² CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel Oct. 30, 2014) ¶ 30.

practice of sending unsolicited faxes.³ Getting caught on August 24, 2015, fails to demonstrate that McVey made *any effort* to comply with the Commission's October 30, 2014 Order. Under such a theory, a junk faxer could delay until the end of the TCPA's four year statute of limitations to see if it would get caught, and if it did then at that late date argue that that their delay in filing within the six month window in the October 30, 2015 Order should be excused. As such, its Petition should be denied as no good cause exists for McVey's untimely application, nor should the Commission choose to favor such gamesmanship by an untimely petitioner such as McVey.

Next granting McVey the waiver it seeks is improper, as agencies "may not retroactively change the rules at will."⁴ That is because the Commission cannot through administrative action or even through a regulation, extinguish private plaintiffs' right to sue since to do so would be inconsistent with the Telephone Consumer Protection Act that authorizes a private right of action.⁵

Even though the Commission is authorized by Congress to define the requirements under the TCPA, "a statutory grant of legislative rulemaking authority will not, as a general matter be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."⁶ The TCPA does not expressly authorize the

³ Notably, McVey incorrectly represents to the Commission that Plaintiff's Complaint alleges that the subject fax advertisement are, "without a complaint opt-out notice", McVey Petition, p. 2, when Plaintiff's Complaint only alleges that the fax was unsolicited. *Florence Mussat M.D., S.C. v. McVey Associates, Inc.*, 1:15-cv-07406, Doc. 1, Complaint, filed August 24, 2015.

⁴ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 123 (D. C. C. 2008).

⁵ See, e.g. *Brown v. Gardner*, 513 U.S. 115, 116-121 (1994) (striking down Veteran's Administration regulation applied to personal injury claims process that was inconsistent with the statute).

⁶ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); see generally *Landgraf v. USI Film Products*, 511 U.S. 224 (1994) (discussing presumption against retroactivity of substantive laws when Congress explicitly authorized such retroactivity).

Commission to issue retroactive rules.⁷ Notably, a federal court in ruling on a TCPA case involving an opt-out notice violation has stated that, “the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.”⁸ Notably, the court in *Stryker* held that, “[i]t would be a fundamental violation of the separation of powers for the administrative agency to ‘waive’ retroactively the statutory rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”⁹ The *Stryker* court further stated, “noting in the waiver-even assuming that the FCC ultimately grants it-invalidates the regulation itself” and that “[t]he regulation remains in effect as it was originally promulgated” for the purposes of determining whether a defendant violated the “regulations prescribed under” the TCPA, as directed by § 227(b)(3).¹⁰

Finally, the Commenter has not been afforded an opportunity to rebut McVey’s averments. If the Commission is not going to outright deny the petition on the Commenter’s first two points, the Commission should defer a ruling until the Commenter has been afforded an opportunity to fully rebut the Petitioner’s averments enabling the Commission to make a case-by-case determination of the Petition.

CONCLUSION

The Commission should deny McVey’s Petition as it fails to indicate that it made any effort to file its petition within the six-month window after the Commission’s October 30, 2014

⁷ 47 U.S.C. § 227(b)(2); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 2012 (N.D. Ill. 2013).

⁸ *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014).

⁹ *Id.*

¹⁰ *Id.*

Order, the Commission lacks authority to grant the waiver, and the Commenter has not had an opportunity to rebut Petitioner's averments.

Respectfully submitted,

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